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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-1671

CITY OF COLUMBIA
AND COLUMBIA OUTDOOR ADVERTISING, INC.,
Petitioners,

v.

OMNI OUTDOOR ADVERTISING, INC.,
Respondent.

BRIEF OF ASSOCIATED BUILDERS AND CONTRACTORS, INC. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

STATEMENT OF INTEREST AND SUMMARY OF ARGUMENT

This case involves the scope of two judicially created exemptions to antitrust liability. The jury found that local government officials had abandoned their public duties and joined a private conspiracy to restrain trade in violation of the antitrust laws. The jury also found that an incumbent firm had lobbied for and obtained passage of an ordinance that was known to be unconstitutional, and did so as a means of delaying entry into the marketplace by a competing

firm. The facts are not disputed.[1] The sole question is whether such conduct should be immune from antitrust challenge under the *Parker* or *Noerr-Pennington* doctrines.

Associated Builders and Contractors, Inc. ("ABC") is a national trade association of over 18,000 merit shop construction contractors (contractors that use both union and non-union labor). Since its founding in 1950, ABC and its members have sought to provide high quality, low cost and timely construction work, benefiting businesses, consumers and taxpayers. The objectives of ABC and its members are often threatened or thwarted by anticompetitive activity at the local level which improperly precludes the acceptance of more favorable bids submitted by merit shop contractors on construction projects. Such activity includes alliances between some local government officials and pro-union interest groups that reflect purely private undertakings not related to the protection of the public interest. It also includes what ABC and its members consider to be sham activity before various permit authorities and courts. In many cases ABC's members are not from the locality which is imposing the restraint, and thus they have no remedy through the political process. The Court's interpretation of the *Parker* and *Noerr-Pennington* exemptions to the antitrust laws in this case will have a direct effect on the ability of ABC and its members

[1] While petitioners spend several pages in their opening brief discussing their view of the facts (*see* Brief for Petitioners at 2-6), this case is not an appeal from the jury's verdict based upon insufficiency of the evidence. Thus, the facts, as found by the jury, are controlling here.

to defend themselves against such efforts to restrain competition in the construction business.

ABC, as an *amicus* filing a brief in support of respondent,[2] asks the Court to affirm the following two principles:

(1) The limited immunity from antitrust liability created for municipal governments under the *Parker* doctrine, as extended in *Town of Hallie*, does not apply to conduct by local officials that is undertaken pursuant to a private agreement to restrain trade rather than an intent to serve the public interest.

(2) The "sham" exception to the limited immunity from antitrust liability created for persons who petition the government under the *Noerr-Pennington* doctrine applies to conduct that would not have been undertaken but for its ability to restrain trade without regard to its success in obtaining relief from the government, even where some success before the governmental body is achieved.

As this Court has noted, the antitrust laws, and the economic system they protect, are an important part of the American system. *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 4 (1958) (antitrust laws create an economic environment "conducive to the preservation of our democratic political and social institutions"). This Court has often spoken of the antitrust laws in terms generally saved for a discussion of the Constitution itself. *Appala-*

[2] Pursuant to Rule 37.3 of the Rules of this Court, this brief is filed with the consent of petitioners and respondent. Letters of consent from all parties are being filed concurrently herewith.

chian Coals, Inc. v. United States, 288 U.S. 344, 359-60 (1933) (Sherman Act has "a generality and adaptability comparable to that found to be desirable in constitutional provisions"); *United States v. Topco Associates, Inc.*, 405 U.S. 596, 610 (1972) ("Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms.")

The rules articulated in this brief are needed to preserve the application of the antitrust laws in two categories of cases where conduct which clearly restrains trade might mistakenly be protected because it is similar to legitimate conduct that is properly immune from antitrust challenge.

The first category of cases includes those where local officials have abandoned their obligation to serve the public interest and have instead joined a private agreement to restrain trade. For example, in this case the jury found that local officials had acted purely with the intent of protecting the owners of an incumbent local firm against competition from a new entrant without regard to the public interest. In such cases the local government has rid itself of whatever protection it might otherwise have claimed as a branch of government, and is entitled to no better treatment under the antitrust laws than any other private person.

The second category of cases includes those where a private person has successfully petitioned a branch of government to act in a way that restrains trade, but in doing so was primarily motivated by the re-

strictions on competition brought about by the petitioning activity itself, and not by the action of the government. If a party would not have filed a lawsuit but for the injury it could inflict on its competition as a result of the litigation process itself (*i.e.*, discovery, delay, etc.), as distinguished from whatever relief the court ultimately might award, that lawsuit is a "sham" use of the judicial process even if some success is obtained, and should not be immune from antitrust challenge. In such cases the effort to obtain governmental action is a pretext to disguise a more crude intent to use the petitioning process itself to interfere with competition.

Petitioners ask this Court to adopt rules of law which will immunize admittedly anticompetitive conduct by persons who abuse their positions of public trust, or use the political or the judicial process as a pretext or cloak for predatory market conduct. Such an approach would improperly encroach upon the free market principles embodied in the antitrust laws without serving any legitimate federalist or First Amendment interests.

ARGUMENT

I. MUNICIPAL GOVERNMENTS ARE NOT IMMUNE FROM ANTITRUST CHALLENGE WHEN THEY ACT PURSUANT TO PRIVATE AGREEMENTS TO RESTRAIN TRADE AND NOT IN THE PUBLIC INTEREST

While state governments are entitled to special immunity under the antitrust laws because of federalist concepts in the Constitution, municipal governments, even though a branch of state government, are not

entitled to the same status.[3] The Court was divided on this issue in 1978. *Compare City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 411-13 (1978) (Opinion of Brennan, J.) *with* 435 U.S. at 426-34 (Opinion of Stewart, J.). But the question was decided by a unanimous Court in 1985, which held that municipalities "are not beyond the reach of the antitrust laws by virtue of their status because they are not themselves sovereign." *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 38 (1985).

Municipal governments may derive immunized status only if their actions are "authorized by the State 'pursuant to state policy to displace competition with regulation or monopoly public service.' " *Town of Hallie, supra*, 471 U.S. at 38-39 (quoting *City of Lafayette, supra*, 435 U.S. at 413). But this Court has restricted the states' authority to grant immunity. In *Town of Hallie* this Court implicitly said that the states could not immunize local actions that were not undertaken in the public interest. In recognizing a limited immunity for municipalities, the Court said: "We may presume, absent a showing to the contrary, that the municipality acts in the public interest." *Town of Hallie, supra*, 471 U.S. at 45. The Court would not have noted the issue of whether the municipality

[3] The distinction between the treatment accorded states and that accorded municipalities by the federal courts under our Constitutional scheme is highlighted by the absence of any immunity for the latter under the Eleventh Amendment. In a unanimous decision, this Court held: "The bar of the Eleventh Amendment to suit in federal courts extends to States and state officials in appropriate circumstances . . . but does not extend to counties and similar municipal corporations." *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 280 (1977).

was acting in the public interest if it were not relevant to the question of immunity. And, the Court would not have reserved a party's right to make "a showing to the contrary" if the presumption that the municipality had acted in the public interest was not rebuttable. Thus, a public interest limitation on municipal immunity was retained by the Court.[4]

A private party must be able to challenge the actions of municipal officials who choose not to act as government officials, but as private persons, serving private and not public interests.[5] To sustain such a

[4] The Court's decision to deny immunity to municipalities engaging in private antitrust agreements is consistent with limitations the Court has recognized in other contexts involving state and even federal authorities. *See Parker v. Brown*, 317 U.S. 341, 351-52 (1943) ("we have no question of the state or its municipalities becoming a participant in a private agreement or combination"); *United Mine Workers v. Pennington*, 381 U.S. 657, 671 (1965) ("the action . . . was the act of a public official who is not claimed to be a co-conspirator"). However, it would not be unreasonable, given the lesser status granted municipal governments in the federalist scheme, for the law to impose restrictions on the actions of local governments which are more strict than those imposed on the actions of state governments or branches of the federal government.

[5] This is not to suggest that the federal courts will be in the business of reviewing all municipal actions to determine if they are consistent with "a national code of ethics." Brief for Petitioners at 12. Courts will be looking at local government actions only when there is a properly asserted antitrust claim, and will be doing so only to decide the issue of immunity. While acting pursuant to a private undertaking outside the public interest is not in itself a federal offense nor a basis for court intervention, it may appropriately determine whether the municipality is entitled to a special grant of immunity with respect to conduct which is otherwise clearly illegal under the antitrust laws.

challenge, the plaintiff must show the elements of an antitrust violation,[6] and that the municipal government acted pursuant to a private agreement to restrain trade rather than in the public interest. Where there is sufficient evidence on these points, a private party should have the right to present its case to a jury.[7]

Allowing a private party to challenge actions by a municipal government in federal court under the antitrust laws is not contrary to fundamental policies nor an undue burden on local political processes. Truly legitimate governmental action is protected by the limited immunity recognized in *Town of Hallie*.[8] In

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[6] Successfully showing that conduct is not immune does not establish that the conduct is an antitrust violation. To prevail, a plaintiff must meet the standard requirements of the Sherman Act. *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1247 n.7 (9th Cir. 1982), *cert. denied*, 459 U.S. 1127 (1983); I P. Areeda & D. Turner, *Antitrust Law* ¶ 201 (1978).

[7] At trial, cities will not be able to insulate their conduct by creative characterizations and contrived justifications. *See Nollan v. California Coastal Commission*, 483 U.S. 825, 841 (1987).

[8] There is no real encroachment on the authority of the states, for there is no reason to presume that states would want to authorize municipalities to act outside the public interest. Thus, actions by a municipality not undertaken in the public interest would also be outside the scope of those authorized by the state—*i.e.*, "*ultra vires*"—and not immune. *See, e.g., Bolt v. Halifax Hosp. Medical Center*, 891 F.2d 810, 824-25 (11th Cir. 1990) (*ultra vires* conduct is not a foreseeable use of state grant of authority); *Westborough Mall, Inc. v. City of Cape Girardeau*, 693 F.2d 733, 746 (8th Cir. 1982), *cert. denied*, 461 U.S. 945 (1983) (a conspiracy to thwart normal zoning procedures and to injure directly the plaintiffs by illegally depriving them of their property is not in furtherance of any clearly articulated state

addition, municipal governments are protected from baseless lawsuits by the tough strictures of Rule 11 of the Federal Rules of Civil Procedure (sanctions for unfounded claims). Colorable, but ultimately unsupported antitrust claims are weeded out by standards for summary judgment and directed verdicts that have been fine-tuned by this Court in recent decisions, including decisions involving antitrust cases. *See Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984); *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

The questions that would be presented to courts, and ultimately to jurors, in such cases would not be unlike those raised in other antitrust cases. Jurors may be asked whether the local government acted pursuant to an agreement with a private party to restrain trade or pursuant to a unilateral decision regarding what was in the public interest. This is precisely the type of question that courts and jurors face in classic distributor termination cases where a manufacturer receives complaints from some distributors before terminating another. *See, e.g., Monsanto Co. v. Spray-Rite Service Corp., supra*, 465 U.S. at 764. The fact that the alleged co-conspirators are city officials and not corporate officers does not make the inquiry any more difficult, nor does it counsel in favor of any different standard.

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policy); *Laidlaw Waste Sys., Inc. v. City of Ft. Smith*, ___ F. Supp. ___, No. CIV. 90-2134, slip op. at 4 (W.D. Ark. Aug. 8, 1990) (available on Westlaw, 1990 WL 119673) ("[A]lthough the Arkansas legislature intended to allow municipalities to authorize waste disposal monopolies, it did not intend to allow unfair competition by municipalities").

Nor would this standard unduly interfere with a legislator's ability to obtain information from constituents. As articulated by this Court, the *Monsanto* standard recognizes that a manufacturer may properly solicit and obtain information from its distributors before making its unilateral decision to terminate a distributor pursuant to what the manufacturer believes to be the best interests of the distribution system it oversees. *Id.*, 465 U.S. at 763-64. Similarly, municipal officials are free to gain input from constituents so long as they ultimately exercise their public duties and act in the public interest and not pursuant to a private agreement to restrain trade. Adherence to the *Monsanto* standard would require the plaintiff to produce evidence that "tends to exclude the possibility" that the municipality acted independently, rather than pursuant to a private agreement to restrain trade—a tough standard that further insulates municipal officials from unfounded lawsuits.

These courtroom procedures and rules provide a meaningful way for trial courts to dispose of antitrust claims not deserving a trial. *See, e.g., Commuter Transportation Systems, Inc. v. Hillsborough County Aviation Authority*, 801 F.2d 1286, 1291 (11th Cir. 1986) (reversing denial of summary judgment in the *Parker* context). Where trials are appropriate, courts and juries are equipped to reach proper decisions.[9]

[9] *Dimick v. Schiedt*, 293 U.S. 474, 485-86 (1935) (jury trial is "generally regarded as the normal and preferable mode of disposing of issues of fact in civil cases"); *Sioux City & Pacific Railroad Co. v. Stout*, 84 U.S. (17 Wall.) 657, 664 (1874) ("It is assumed that twelve men know more of the common affairs of life than does one man. . . ."); *In re United States Financial Securities Litigation*, 609 F.2d 411, 431 (9th Cir. 1979), *cert. denied*, 446 U.S. 929 (1980) ("[N]o one has yet demonstrated how one judge can be a superior fact-finder to the knowledge and experience that citizen-jurors bring to bear on a case.")

Where the municipality is proven to have violated the antitrust laws, damage exposure is limited in appropriate cases by the Local Government Antitrust Act of 1984, 15 U.S.C. §§ 34-36.

Denial of a private party's right to challenge municipal action in appropriate circumstances would thwart important antitrust policies without justification. City governments are by nature parochial in their interests, and are prone to actions that may benefit narrow, local interests to the detriment of competition in the larger marketplace. *See City of Lafayette, supra*, 435 U.S. at 408 ("If municipalities were free to make economic choices counseled solely by their own parochial interests and without regard to their anticompetitive effects, a serious chink in the armor of antitrust protection would be introduced at odds with the comprehensive national policy Congress established.") Moreover, it may often be an "outsider" that is the target of the anticompetitive effort. Such an "outsider" will lack the ability to participate effectively in the local political process, and would therefore lack any remedy if denied the judicial remedy. *See id.*, 435 U.S. at 406-07; *see also Wall v. City of Athens*, 663 F. Supp. 747, 760 (M.D. Ga. 1987) ("By furthering purely parochial interests through contracts in restraint of trade between city officials and private corporations, and by discriminating economically and commercially between residents of the city and residents outside the city, the city has en-

gaged in conduct outside of the protection of 'sovereign state policy.' ").

Federal courts may intervene in local government actions to protect important federal policies. *See, e.g., Golden State Transit Corp. v. City of Los Angeles*, ___ U.S. ___ , 110 S.Ct. 444, 107 L. Ed. 2d 420 (1990) (city held liable for compensatory damages under 42 U.S.C. § 1983 based on violation of National Labor Relations Act); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 67-72 (1981) (interference with rights guaranteed by the First and Fourteenth Amendments); *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 638-39 (1973) (federal preemption); *Nectow v. City of Cambridge*, 277 U.S. 183, 188-89 (1928) (taking of property without due process); *Buchanan v. Warley*, 245 U.S. 60, 81-82 (1917) (racial discrimination).[10] Antitrust is one of the most important federal policies. It is not asking too much to have the balance between antitrust and local political processes struck in such a way as to preserve a modest right to seek judicial review of local action that is undertaken as part of a private conspiracy and not in the public interest.

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[10] A balancing of interests, rather than a pure "hands off" approach, is required when considering the extent to which a court should interfere in the legislative or executive process. While the judiciary should not lightly undertake to review the actions taken by the other branches of government, no government official or body should be above the law. An approach resulting in "qualified" immunization should be the norm. *Cf., Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982).

II. MOTIVE SHOULD BE TESTED UNDER THE SHAM EXCEPTION TO THE *NOERR-PENNINGTON* DOCTRINE EVEN WHERE PETITIONING ACTIVITY IS SOMEWHAT SUCCESSFUL

The jury in this case found that Columbia Outdoor Advertising's predominant purpose in invoking the political process was to inflict injuries on its competitor which flowed from the use of the process itself, and not to obtain legitimate legislative action. The key evidence related to the continuing pressures placed upon the city council to enact, and later to defend, legislation that legal counsel had advised was unconstitutional. *See Omni Outdoor Advertising, Inc. v. Columbia Outdoor Advertising, Inc.*, 891 F.2d 1127, 1138-39 (4th Cir. 1989). Such conduct was found to be "sham" lobbying activity, and outside the protections of the *Noerr-Pennington* doctrine. *Id.* at 1139.

The petitioners and the dissent in the Fourth Circuit suggest that the firm's actions should be immune from challenge because those efforts were successful at least in part in obtaining governmental action—*i.e.*, the passage of the unconstitutional ordinance. *See* Petition for a Writ of Certioriari at 13; *Omni Outdoor Advertising, Inc. v. Columbia Outdoor Advertising, Inc., supra*, 891 F.2d at 1147-49 (Wilkins, J., dissenting). Granting immunity based upon such an "objective" standard unnecessarily limits the applicability of the "sham" exception. Instead, a subjective test of motive is essential to give the "sham" exception life.

The "sham" exception is aimed at detecting those occasions where petitioning activity is a pretense or a sham, and therefore not deserving of special immunity from challenge under the antitrust laws. The

Court has decided to tolerate restraints on competition properly imposed by governmental acts, and therefore must also tolerate petitioning activity aimed at achieving such action by the government. But the Court has drawn the line and said that where the restraints on competition flow from the petitioning activity, and not from the actions ultimately taken by the government, then no special immunity is justified. *See Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 144 (1961) (antitrust liability not excused if conduct "is a mere sham").

The difficulty in framing a proper rule of law to define "sham" conduct arises from the fact that most conduct springs from more than one motive. A firm may seek passage of legislation favoring its business, while also noting that the uncertainties created by the pendency of the bill will have the effect of deterring entry by a new competitor even in the absence of enactment. Similarly, a firm may file a lawsuit against a competitor noting that it has some, although small, chance of success, while also realizing that the costs of litigating the case may be sufficient to drive the competitor from the market no matter how the lawsuit is ultimately decided.

The "objective" test chooses to simplify the world and say that if some success is achieved, then no further inquiry is required to determine if the petitioning process was abused. Under the "objective" test, any success, no matter how meager and no matter how much the result of luck rather than merit, is enough to displace the policies embodied in the antitrust laws. Such a rule of law goes too far in protecting conduct that is injurious, and suggests by

implication that our courts are not equipped to do better in distinguishing between proper and improper conduct.

Courts and judges are prepared to exercise their judicial duties by scrutinizing conduct and detecting pretextual petitioning activity. *See, e.g., Grip-Pak, Inc. v. Illinois Tool Works, Inc.*, 694 F.2d 466, 471-73 (7th Cir. 1982), *cert. denied*, 461 U.S. 958 (1983) ("The line is crossed when his purpose is not to win a favorable judgment against a competitor but to harass him, and deter others, by the process itself—regardless of outcome—of litigating."); *South Dakota v. Kansas City Southern Industries, Inc.*, 880 F.2d 40, 54 n.30 (8th Cir. 1989), *cert. denied*, ___ U.S. ___, 110 S.Ct. 726, 107 L. Ed. 2d 745 (1990) ("This is not to say that successful litigation shall categorically preclude a finding of sham."); *In re Burlington Northern, Inc.*, 822 F.2d 518, 527-28 (5th Cir. 1987), *cert. denied*, 484 U.S. 1007 (1988) ("The determinative inquiry is not whether the suit was won or lost, but whether it was significantly motivated by a genuine desire for judicial relief.") In *Grip-Pak* the Seventh Circuit stated:

> [W]e are not prepared to rule that the difficulty of distinguishing lawful from unlawful purpose in litigation between competitors is so acute that such litigation can never be considered an actionable restraint of trade, provided it has some, though perhaps only a threadbare basis in law.

Grip-Pak, Inc. v. Illinois Tool Works, Inc., supra, 694 F.2d at 472.

The reluctance of these courts to adopt the "objective" test is based on the reality "that the 'usual

litigant will base its decision to sue on a number of factors,' " (*In re Burlington Northern, supra*, 882 F.2d at 528), and the observed use in the marketplace of pretextual petitioning activity, including litigation, to injure competitors. As the Seventh Circuit explained:

> Many claims not wholly groundless would never be sued on for their own sake; the stakes discounted by the probability of winning, would be too low to repay the investment in litigation. Suppose a monopolist brought a tort action against its single, tiny competitor; the action had a colorable basis in law; but in fact the monopolist would never have brought the suit—its chances of winning, or the damages it would get if it did win, were too small compared to what it would have to spend on the litigation except that it wanted to use pretrial discovery to discover its competitor's trade secrets; or hoped that the competitor would be required to make public disclosure of its potential liability in the suit and this disclosure would increase the interest rate that the competitor had to pay for bank financing; or just wanted to impose heavy costs on the competitor in the hope of deterring entry by other firms. In these examples the plaintiff wants to hurt a competitor not by getting a judgment against him, which would be a proper objective, but just by the maintenance of the suit, regardless of its outcome.

Grip-Pak, Inc. v. Illinois Tool Works, Inc., supra, 694 F.2d at 472.

The "objective" test would so emasculate the sham exception to *Noerr-Pennington* that it would be "a

wise competitive strategy for a company to engage its competitors in expensive and protracted litigation, not because of any hope of success or intent to enforce the law, but merely to disadvantage and even destroy the competitor." Kintner & Bauer, *Antitrust Exemptions for Private Requests for Governmental Action: A Critical Analysis of the Noerr-Pennington Doctrine*, 17 U.C. Davis L. Rev. 549, 571 n.94 (1984).[11]

Allowing courts and, where appropriate, juries to evaluate petitioning behavior under a subjective test

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[11] Theoretical economists have suggested, and some courts have agreed, that actions taken to discipline competitors are not effective so long as entry and exit barriers are low. *See, e.g.*, Joskow & Klevorick, *A Framework for Analyzing Predatory Pricing Policy*, 89 Yale L.J. 213 (1979); *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 119 n.15 (1986); *Matsushita Electric Industrial Co. v. Zenith Radio Corp., supra*, 475 U.S. at 588-90; *A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 881 F.2d 1396, 1401 (7th Cir. 1989). However, more recent thinking by economists has tended to coincide with what common sense tells us about human behavior: Firms, like the people that run them, do not like to be hurt or defeated. If firms are punished in the marketplace, they look elsewhere to do business, and others that might have entered that market will also look elsewhere. *See, e.g.*, Ordover & Wall, *Proving Predation After Monfort and Matsushita: What the New Learning Has to Offer*, 1 Antitrust 5 (Summer 1987); Baker, *Recent Developments in Economics That Challenge Chicago School Views*, 58 Antitrust L. J. 645 (1989); Ordover & Saloner, *Predation, Monopolization and Antitrust*, 1 Handbook of Industrial Organization (R. Schmalensee and R.D. Willig, eds.) at 537-96 (1989). One writer noted that even where structural barriers to entry are low, "a lawn strewn with the lifeless corpses of failed entrants" may effectively deter new entry. Rapp, *Predatory Pricing Analysis: A Practical Synthesis* (Working paper presented before the American Bar Association Antitrust Section Spring Meetings, March 21, 1990). Thus, market disciplining behavior through sham petitioning can make rational economic sense.

for sham activities would not result in the imposition of undue risks on persons legitimately using governmental processes. The right to litigate an issue does not mean that the plaintiff will always have sufficient facts to withstand a motion to dismiss, to withstand a motion for summary judgment, to withstand a motion for directed verdict, or to gain a favorable jury verdict.[12] The facts will be tested in accord with established pretrial and trial procedures. A defendant charged with sham conduct may show that its conduct was successful. Depending on the evidence presented by the plaintiff to show pretextual motives, evidence of success may result in termination of the case at the motion stage, or successful resolution of the case at trial. *See, e.g., In re Burlington Northern, supra,* 822 F.2d at 528 ("Of course, the success of the claim presented is persuasive evidence that the litigant in fact wanted the relief."); *G. Heileman Brewing Co. v. Anheuser-Busch, Inc.*, 676 F.Supp. 1436, 1476 (E.D. Wis. 1987), *aff'd*, 873 F.2d 985 (7th Cir. 1989) (same). Pretrial and trial procedures refined by this Court in

[12] Those that argue in favor of simplistic rules like the "objective" test as a way of blocking entire classes of litigation do so based on the belief that the judicial system does not function well enough to protect them from frivolous claims, or otherwise brings about irrational results. Such a negative view of the judicial system is not warranted. Attorneys do not, on the whole, file lawsuits where the facts do not support a claim consistent with the law. If they do, there are stiff sanctions available under Rule 11 of the Federal Rules of Civil Procedure. If the facts are colorable, but later turn out to be too weak to proceed to trial, the system disposes of the case summarily. At trial, experience under our system suggests that juries act rationally and appropriately, even in complex cases. *See* cases at n.9, *supra*. Our system does not require artificial rules to "protect" the citizenry from a process gone amok.

recent decisions are sufficient safeguards against baseless or misdirected antitrust suits. *See* discussion at pp. 8-11, *supra*.

In contrast, the "objective" test would result in the filing of lawsuits or other petitioning activity that otherwise would not be pursued. As noted in *Grip-Pak*, a party may evaluate activity differently, and come to a different decision, when it perceives that limited opportunities for success will be augmented by benefits accruing from the process of petitioning without regard to success. *Grip-Pak, Inc. v. Illinois Tool Works, Inc., supra,* 694 F.2d at 472. Allowing pretextual lawsuits to be prosecuted without the fear of antitrust liability could add to already overcrowded dockets. Moreover, there will be cases where legitimate plaintiffs may forego similar litigation, mistakenly believing that their interests are adequately protected, only to see the litigation abandoned or dismissed once its ancillary anticompetitive purposes have been achieved.[13]

The standards for evaluating pretextual petitioning activity under the sham exception must be such that a plaintiff will have a chance to prove that despite some success or chance of success, the activity would

[13] For example, a plaintiff may use environmental challenges to delay a project long enough to gain a competitive advantage or to bring about some change in the project unrelated to environmental concerns. Other environmental groups may choose not to spend limited resources challenging the project, thinking that the issues will be fully litigated. Later, having achieved the non-environmental purposes of the litigation, the plaintiff may settle or dismiss the suit. Such action would leave a void that cannot be filled effectively by the parties honestly interested in the issues others used as a pretext.

not have been undertaken but for the anticompetitive effects that flow from the petitioning activity itself, without regard to the outcome. Petitioning activity that is primarily or predominantly based upon the effects that flow directly from the activity, and not from any governmental action brought about by the activity, should be regarded as sham. *See, e.g., United States v. Otter Tail Power Co.*, 360 F.Supp. 451, 451-52 (D. Minn. 1973), *aff'd mem.*, 417 U.S. 901 (1974) (applying sham exception where litigation "designed principally" to preserve defendant's monopoly); Bien, *Litigation As An Antitrust Violation: Conflict Between The First Amendment And The Sherman Act*, 16 U.S.F. L. Rev. 41, 92 (1981) (sham exception applies where "the primary purpose behind the initiation of the litigation was to harm the defendant *directly* and not to pursue the cause of action"). Focusing on the strength of the motive to seek governmental action may also be appropriate, so long as the test is one which determines whether the intent to seek governmental relief would, standing alone, have been enough reason to engage in the activity. *See Coastal States Marketing, Inc. v. Hunt*, 694 F.2d 1358, 1372 (5th Cir. 1983), *reh. denied*, 699 F.2d 1163 (5th Cir. 1983) (sham exception will not apply where a genuine desire for governmental action is a "substantial factor" in the decision to engage in the petitioning activity). To be protected activity, the evidence should show that there are sufficient legitimate reasons for engaging in the activity other than the effects the activity will have on competitors without regard to success. *Cf., Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 604-05 (1985) (monopolist's conduct characterized as exclusionary where there were no valid business reasons for its actions).

CONCLUSION

The balance between antitrust policy, federalism and the First Amendment is a delicate balance that is preserved in large part by careful scrutiny of the activities immunized by the *Parker* doctrine and the existence of a viable and meaningful "sham" exception to the *Noerr-Pennington* doctrine. Streamlined rules that seek simplistic solutions while striking an improper balance have no place in our legal scheme. Instead, a strong approach to detecting improper or sham activity is needed to protect important antitrust policies. For the reasons set forth above, this Court should affirm the vigorous application of the antitrust laws to local governments that abandon their public duties, and to persons who use governmental processes as a pretext to cover predatory conduct.

September 18, 1990

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